**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

C.A. No. 03-1877

JEAN MARIE LOUIS,
Petitioner

vs.

JOHN ASHCROFT, Attorney General
of the United States, Respondent

(Agency No. A72-550-854)

Present: NYGAARD, FUENTES AND
GREENBERG, CIRCUIT JUDGES

ORDER

The foregoing motion to dismiss the petition for review for lack of jurisdiction is granted. The petitioner, Jean-Marie Louis, seeks review of the BIA's February 26, 2003, decision in which it ordered Louis removed to Haiti after vacating a prior decision in which it had withheld his removal under the Convention Against Torture (CAT). Under 8 U.S.C. § 1252(a)(2)(C), "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain enumerated offenses, including an "aggravated felony." Our jurisdiction in a case falling under § 1252(a)(2)(C) is limited to determining "whether [the petitioner] is an alien, and whether he is removable by reason of having been convicted of one of the enumerated offenses." *Patel v. Ashcroft*, 294 F.3d 465, 468 (3d Cir. 2002). Louis does not dispute that he is an alien and that his state court conviction for possession with intent to distribute marijuana qualifies as an aggravated felony. Consequently, § 1252(a)(2)(C) "prohibits further adjudication of the petition for review and we must dismiss for lack of jurisdiction." *Patel*, 294 F.3d at 468.

Louis' argument that we can review his "removeability" under the CAT as part of our jurisdictional analysis under § 1252(a)(2)(C) is unavailing. *See Liang v. INS*, 206 F.3d 308, 322-23 (3d Cir. 2000). The holding in *Bosede v. Ashcroft*, 309 F.3d 441 (7th Cir. 2002), lends no support to Louis' position. *See Robledo-Gonzales v. Ashcroft*,— F.3d—, 2003 WL 21715838 at *9 (7th Cir. July 25, 2003) (noting, *inter alia*, that the *Bosede* "commentary on the availability of review for constitutional and statutory-interpretation questions was dicta"). As to Louis' contention that he was denied due process because he was not afforded notice of the proceeding on the motion to reopen the CAT claim, we have no jurisdiction over a criminal alien's "substantial constitutional claims" raised in a petition for review. *Liang*, 206 F.3d at 322. We see no basis for this panel to "revisit" *Liang* in light of *Calcano-Martinez v. INS*, 533 U.S. 348 (2001), or the other cases cited by Louis. *See Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1068-70 (9th Cir. 2003). For these reasons, the respondent's motion is granted and the petition for review is dismissed for want of jurisdiction. The request for a stay of removal is denied as moot. Louis may, of course, seek to pursue remedies, if any, that might be available on his claims through a 28 U.S.C. § 2241 petition filed in an appropriate district court.

By the Court,

/s/
Circuit Judge

Dated: Aug 22 2003

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 03-1877

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JEAN MARIE LOUIS,

Petitioner

v.

JOHN ASHCROFT, Attorney General of the United States,

Respondent

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On Appeal from the Board of Immigration Appeals
(No. A72-550-854)

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SUR PETITION FOR REHEARING

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BEFORE: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, and GREENBERG, Circuit Judges[1]

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The Petition for rehearing filed [sic] the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for

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[1] Judge Greenberg's vote is limited to panel rehearing only.

rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered

By the Court,

/s/
United States Circuit Judge

DATE: Oct 3 2003

CPS-201

May 8, 2003

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

C.A. No. 03-1877

JEAN MARIE LOUIS,
Petitioner

vs.

JOHN ASHCROFT, Attorney General
of the United States, Respondent

(Agency No. A72-550-854)

Present: NYGAARD AND FUENTES, CIRCUIT JUDGES

ORDER

The petitioner, Jean Marie Louis, is hereby directed to show cause, within ten (10) days of the date of this Order, why this Court should not dismiss his petition for review for want of jurisdiction. *See* 8 U.S.C. § 1252 (a)(2)(C) ("[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section . . . 1227(a)(2)(A)(iii)."). The government may file a response to this jurisdictional issue within five (5) days after the filing of petitioner's response. A ruling on the motion for a stay of removal is held in abeyance pending consideration of the jurisdictional issue.

By the Court,

/s/
Circuit Judge

Dated: Jun 09 2003

**U.S. Department of Justice**
Executive Office for Immigration Review
Falls Church, Virginia 22041

**Decision of the Board of Immigration Appeals**

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File: A72 550 854 - York Date: Feb 26 2003

In re: JEAN MARIE LOUIS

IN WITHHOLDING ONLY REMOVAL PROCEEDINGS UNDER SECTION 238 (b) of the ACT.

MOTION

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF SERVICE: Jeffrey T. Bubier
Assistant District Counsel

APPLICATION: Reopening

ORDER:

PER CURIAM. The Immigration and Naturalization Service moves the Board pursuant to 8 C.F.R. § 3.2 to reopen and vacate our previous decision dated October 24, 2001. The respondent has not replied to the motion. Although it is untimely, we will grant the motion to reopen *sua sponte*. *See Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997); 8 C.F.R. § 3.2(a).

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[1] The respondent's attorney did not formally enter his appearance with the Board through the filing of a Form EOIR-27, as required by 8 C.F.R. § 3.3(a)(2). Therefore, we must consider the respondent to be proceeding pro se. As a courtesy, however, we will send a copy of this decision to the attorney [illegible].

In our October 24, 2001, decision, we dismissed the Service appeal of the Immigration Judge's grant of withholding of removal under Article 3 of the Convention Against Torture (CAT), 8 C.F.R. § 208.16. Specifically, we found that the respondent, as a criminal returnee, had established that it is more likely than not that he would face torture upon return to Haiti. Subsequent to this Board's decision, *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), was issued. In *Matter of J-E-*, *supra*, we determined that substandard prison conditions in Haiti do not constitute torture within the meaning of 8 C.F.R. 208.18(a) where there is no evidence that the authorities intentionally create and maintain such conditions in order to inflict torture. We find *Matter of J-E-*, *supra*, controlling here.

Accordingly, the motion is *granted*, the proceedings are reopened, and our previous decision dated October 24, 2001, is vacated. The Service appeal is sustained, the Immigration Judge's order is vacated and the respondent is ordered removed from the United States to Haiti.

/s/
FOR THE BOARD

**U.S. Department of Justice**
Executive Office for Immigration Review
Falls Church, Virginia 22041

**Decision of the Board of Immigration Appeals**

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File: A72 550 854 - York Date: Oct 24 2001

In re: JEAN MARIE LOUIS

IN WITHHOLDING ONLY REMOVAL PROCEEDINGS UNDER SECTION 238 (b) of the ACT.

APPEAL

ON BEHALF OF RESPONDENT: Paul Buono, Esquire

ON BEHALF OF SERVICE: Jeffrey T. Bubier
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony

APPLICATION: Withholding of removal; Convention Against Torture

In a decision dated February 6, 2001, an Immigration Judge denied the respondent's application for withholding of removal under section 241(b)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B), but granted him withholding of removal under Article 3 of the Convention Against Torture (CAT).[1] The Immigration and

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[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

Naturalization Service has appealed the grant of relief. The appeal will be dismissed.

The respondent is a 36-year old native and citizen of Haiti who was paroled into the United States on or about July 1, 1992. On May 3, 2000, the respondent was issued a Notice of Intent to Issue a Final Administrative Removal Order. He was charged with removability under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony under section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B) (drug trafficking crime). The charge was based on the respondent's May 25, 1999, conviction in Pennsylvania for possession with intent to deliver a controlled substance. A Final Administrative Removal Order was issued on June 19, 2000. The respondent's case was subsequently referred to an Immigration Judge after it was determined that he had a reasonable fear of persecution of torture.

At his hearing, the respondent testified that he was a member of Lavalas before Jean Bertand Aristide was elected to be President. The respondent had problems when the military overthrew Aristide in 1992. The respondent belonged to a neighborhood watch group, and one night there was an upheaval near his house. The respondent saw people shot and arrested, and he was arrested when he emerged from his home. The respondent was placed in a truck with others, and he subsequently escaped. He went into hiding for a short period and then fled to Cuba. He was subsequently paroled into the United States.

The respondent feared that he would be harmed by anti-Aristide forces if he returned to Haiti. He did not know who was the current President of Haiti, but feared harm because he did not believe that things ever changed that much in his country. He explained that he had recently read an Amnesty International report which stated that conditions in his country had not really improved. The respondent's parents and siblings still live in Haiti, but he has not spoken to them

since his 1992 departure. The respondent also feared being detained upon return to Haiti due to his status as a deportee.

The respondent was asked about his conviction, and he explained that he had been driving a "gypsy cab" and was hired to deliver a package. He was initially unaware of its contents, but upon arrest he learned that it contained marijuana. In its closing, the Service argued that the respondent did not meet his burden of proof for withholding of removal under section 241(b)(3)(B) of the Act or CAT.

The record contains the respondent's Application for Asylum and Withholding of Removal (Form I-589) (Exh. 4). There is also an article discussing 38 deportees who arrived in Haiti on March 24, 1999, and were taken into detention by Haitian authorities. Subsequent interviews revealed that the deportees were taken into custody to protect the public from potential criminal misbehavior. *See* Caitlin Montague, *Mistreatment of Criminal Deportees to Haiti* (August 25, 1999) <http://www.ciponline.org/caitlin.htm> (Exh. 6).

The Service submitted a Record of Deportable Alien (Form I-213), a record of conviction, a "memo to file" regarding the respondent's parole, and the *1999 Country Reports on Human Rights Practices, Haiti* (February 25, 2000), and the *Profile of Asylum Claims and Country Conditions, Haiti* (March 31, 1998), both issued by the Dept. of State's Bureau of Democracy, Human Rights and Labor (BDHRL) (*see* Group. Exh. 5). The *Country Reports* note that the Haitian government has a poor human rights record, and poor prison conditions, including food shortages, are a problem. *Profile* at 7. Further, police mistreatment of suspects occurs in all parts of the country, and reported forms of abuse include burning with cigarettes, choking, hooding, and severe boxing of the ears. *Id.* at 5.

The Immigration Judge found that the respondent was a credible witness, but that he did not meet his burden of proof for withholding of removal under section 241(b)(3)(B) of the

Act. He considered the current shift of power in Haiti, and the lack of any evidence that anyone would be interested in the respondent because of his former political activities.

The Immigration Judge did find that the respondent met his burden of proof for CAT relief. He considered that the documentary evidence in the record established that criminal deportees are detained upon arrival to Haiti, and that prisoners were subject to physical abuse. The Immigration Judge concluded that it was more likely than not that the respondent would face torture upon return to Haiti. The Immigration Judge also commented that he had heard from a State Department employee that criminal returnees were now being indefinitely detained, although he recognized that this information could [sic] was "outside the record" and not appropriate for consideration (*see* I.J. Dec. at 6-7).

Finally, the Immigration Judge concluded that based on the evidence of record and under the factors listed in *Matter of L-S-*, Interim Decision 3386 (BIA 1999), the respondent had not been convicted of a "particularly serious crime." *See* section 241(b)(3)(B) of the Act. The respondent was therefore granted withholding of removal under CAT.

The Service has appealed the finding [sic] the grant of CAT relief. It asserts that the respondent did not meet his burden of proof for CAT, and that the Immigration Judge impermissibly relied on evidence outside of the record to reach his decision. It points out that the on-line article in the record also states that some deportees arriving in Haiti have been directly released from the airport. *See* Exh. 6 at 2. Further, there was no other proof that returnees were subject to significant periods of detention.

The respondent has submitted a brief in support of the decision of the Immigration Judge. He additionally argues that the Immigration Judge's decision is supported by previously unavailable evidence, namely the *2000 Country*

*Reports on Haiti*, which was released by the BDHRL on February 26, 2001. It emphasizes the following statement:

> In the past, when the authorities received Haitian citizens deported from other countries for having committed crimes, they were processed in 1 week and then released. However, since March 24, criminal deportees who already have served sentences outside the country are kept in jail, with no timetable for their eventual release. Prosecutor Augustus Brutus said that "preventive measures" are being taken to prevent the "bandits" from increasing the level of insecurity and crime in the country.

*Profile* at 5. The report also states that "[p]olice mistreatment of suspects both at the time of arrest and during detention remains pervasive in all parts of the country." *Id.* at 4. Further, "[t]orture and other forms of abuse are pervasive." *Id.* Additionally, prison conditions remain "very poor" and this includes an inability to properly feed the prisoners. *Id.* at 5.

The Service has not replied to the respondent's argument and additional evidence. On review, we find that the Service appeal should be dismissed.

Initially, we address the Service's argument that the Immigration Judge erred in his final decision by considering what he "heard" from the State Department regarding the treatment of returnees to Haiti. We agree with the Service that this evidence had no place in the Immigration Judge's decision. Specifically, it was undocumented, and the Service was not given any opportunity to address or rebut the statement. Further, the evidence was not included in the record for appellate review. *See Matter of S-M-J-*, 21 I&N Dec. 722, 727-8 (BIA 1997) (explaining that any evidence relied upon by an Immigration Judge must be included in the record). Under these circumstances, the Immigration Judge should not have considered this evidence to any extent.

However, the Service was ultimately not prejudiced by this commentary as the record otherwise contains evidence to support the grant of CAT relief.

We next examine the issue of statutory eligibility for the requested forms of relief. The respondent has been convicted of an aggravated felony, which bars him from asylum. *See* section 208(b)(2)(B) of the Act, 8 U.S.C. § 1158(b)(2)(B). The respondent's aggravated felony conviction does not automatically bar him from withholding because he received a sentence of under 5 years. *See* section 241(b)(3)(B)(ii) of the Act, 8 U.S.C. § 1231(b)(3)(B)(ii) and final paragraph.[2] Rather, we examine the particulars of the crime to determine whether it is "particularly serious." *See Matter of S-S-*, Interim Decision 3374 (BIA 1999) (holding that in making this discretionary determination, we will use the analysis set forth in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), *modified*, *Matter of C-*, 20 I&N Dec. 529 (BIA 1992), *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988)).

Relevant factors for this determination include the nature of the conviction, its circumstances and underlying facts, the sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the respondent is a danger to the community. *Matter of Frentescu*, *supra*, at 247. Crimes against persons are more likely to be categorized as particularly serious, but there may be instances where crimes against property will be considered to be particularly serious. *Id.* Further, once an alien is found to have committed a particularly serious crime, there is no need for a separate determination to address whether the

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[2] We clarify that if a respondent is barred from withholding of removal due to a conviction for a particularly serious crime, he or she is also barred from withholding of removal based on CAT. *See* 8 C.F.R. § 208.16(d)(2). However, the alien may still be considered for deferral of removal under CAT. *See* 8 C.F.R. § 208.17.

alien is a danger to the community. *See Matter of Q-T-M-T-*, 21 I&N Dec. 639, 646-7 (BIA 1996).

The conviction records show that the respondent was convicted of possession for sale, and that he received 11 ½ to 23 months of incarceration. *See* Group Exh. 5B. The respondent testified that his crime involved marijuana, and resulted from him unwittingly delivering a single package when he was driving a "gypsy cab." We recognize the seriousness of drug-related crimes, especially those involving distribution. However, under the circumstances before us, we do not find that the respondent's crime should be labeled "particularly serious." We point out that there was no evidence about the amount of marijuana involved in this crime, and that it appears to have been an isolated incident. Further, the Service did not argue that the crime was particularly serious during the hearing (*see* Tr. at 25, 28-29), and it did not raise the issue on appeal. We therefore conclude that the respondent is not barred from relief under section 241(b)(3)(B) of the Act.

We now address the merits of the respondent's claim. At the time of the Immigration Judge's decision, the record established that the Haitian government was in the practice of detaining criminal deportees, and that detainees were subject to physical abuse and that prison conditions were deplorable. Even if this evidence was not strong enough to support a grant, the respondent now offers additional evidence which meets his burden of proof.

The Board generally does not consider evidence first submitted on appeal. However, the particular circumstances of this case, [sic] we find that such consideration is appropriate. We point out that the evidence was not available at the time of the Immigration Judge's decision, and it is material as it goes to the heart of the respondent's CAT claim. Further, the evidence is from the State Department, a source that it is recognized as highly reliable. *See Matter of V-T-S-*, 21 I&N Dec. 792, 799 (BIA 1997)

(internal cites omitted). Lastly, the Service has been apprized of the recent Country Report, and has offered no rebuttal arguments against its consideration by the Board. Under these circumstances, we find it fair and reasonable to consider the evidence at this juncture in the proceedings.[3] *Cf. Janusiak v. INS*, 947 F.2d 46 (3rd Cir. 1991) (approving the Board's use of administrative notice when denying the respondent's asylum claim).

We conclude that the evidence before us establishes that criminal returnees are being indefinitely detained upon return to Haiti,[4] and that the country has an established record of the serious mistreatment of detainees and prisoners. This evidence is sufficient to establish that it is more likely than not that the respondent will face torture upon return to Haiti. *See* 8 C.F.R. § 208.16(c). Accordingly, the grant of relief will remain undisturbed.

ORDER: The appeal of the Immigration and Naturalization Service is dismissed.

/s/
FOR THE BOARD

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[3] We also consider the futility of returning the record when the Immigration Judge previously found the evidence of record sufficient to support a CAT grant of relief.

[4] This information quells the Service's concern that the evidence of record did not establish that all returnees were detained, or how long they were detained.

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
York, Pennsylvania

File No.: A 72 550 854 February 6, 2001

In the Matter of

| | | |
|---|---|---|
| JEAN MARIE LOUIS, | ) | WITHHOLDING ONLY |
| | ) | REMOVAL PROCEEDINGS |
| Respondent | ) | UNDER SECTION 238 |

CHARGE:

APPLICATION: Withholding of removal and Convention Against Torture.

| ON BEHALF OF RESPONDENT: | ON BEHALF OF SERVICE: |
|---|---|
| Pro se | Jeffrey Bubier, Assistant District Counsel |

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 34-year-old single male alien, native and citizen of Haiti, who was paroled in the United States in 1992 pursuant to Section 212(d)(5) for humanitarian reasons. On June 19th of 2000, the District Director of the Immigration and Naturalization Service issued an administrative order of removal against the respondent due to an "aggravated felony" conviction. In order to avoid removal, the respondent communicated to the Service he had a fear of being persecuted or tortured upon being removed to Haiti. As a consequence, he was directed to an asylum officer of the Immigration and Naturalization Service, who found that the respondent's testimony was credible. He found a reasonable fear of persecution was established and he then referred Mr. Louis to this Court for adjudication of

his Form I-589. The respondent appeared in Court today pro se and testified in support of that application.

Respondent testified that he departed Haiti in April or so of 1992 and went to Cuba and remained there for a short period of time and then was paroled into the United States in July of 1992. He testified he has a high school equivalent diploma and he worked as a bus driver for about eight years, driving a city bus in Port au Prince.

He testified that in 1989 he joined the Lavalas party, which as the Court knows is a political party who supported the presidency of Father Jean Batiste Aristide, who was a Roman Catholic priest at the time. In fact, Father Aristide was elected president in the early part of 1990. However, he lost his presidency when he was ousted by a military coup, which installed Raul Cedras as the interim head of the Haitian government. Respondent testified that he was a community volunteer for the Lavalas party and recruited members, doing whatever was necessary locally in assisting in the clean-up of the neighborhood, in social services-type activities. He became fearful for his life when President Aristide was ousted from office and had to flee to the United States for protection. The military regime at that point then starting [sic] attacking Lavalas supporters. He testified to a certain extent about that. Also, he testified he was arrested at one point, but was able to immediately escape. The Court notes that nowhere in his withholding of removal application did the respondent refer to him being arrested. Nonetheless, the respondent testified as to a lot of violence perpetrated by the military regime against Lavalas supporters and he departed Haiti in 1992 to avoid a like or similar treatment.

He testified that he last heard from his parents and siblings when he departed Haiti and has no communication with them since that time. The reasons for that are essentially unclear, but I think the Court heard that his parents were renters in an apartment or a house and did not own the place and so they may have moved on and he has had no way to find out where

they are. He also testified that he has a fear of returning to Haiti.

In this regard, he testified that he fears returning to Haiti because of his past political activities in support of and as a member of the Lavalas party. He has read Amnesty International reports recently indicating there is still a lot of violence and that the police and military essentially commit human rights abuses and that he feels upon his return he would be treated in like fashion. He denied any knowledge of who was president of Haiti. When the Court pointed out that President Aristide has, in fact, been re-elected President of Haiti, he expressed that President Aristide will probably be killed anyway and that there will be a cycle of violence ensued [sic] like he experienced in the past, which led him to depart his native country. He also testified that it is his knowledge that upon his return he will be imprisoned and kept there as a long term detainee and that, according to his written application, he will be tortured during that time.

The Court has applied the standards for withholding of removal as set forth in the decision of *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). Further, the respondent's testimony has been found to be credible. To that extent, the Court finds that respondent has made no attempt to mislead the Court in any material fashion concerning the reasons he left Haiti and the reasons he has a genuine fear of returning. While the Court believes that respondent has a genuine fear of being persecuted upon his return to Haiti, the Court finds there is no evidence to support his claim in this regard.

That is, the very person respondent worked with the Lavalas party to support in 1992, Jean Batiste Aristide, has once again been elected President of Haiti by an overwhelming support of the population of Haiti. The Court seriously doubts that being a former Lavalas or Aristide supporter would cause him to be singled out for persecution upon his return there. As Service counsel pointed out, the documentary evidence in this case, particularly the

Department of State *Country Reports* and *Profiles* do not corroborate the respondent's claim of any persecution on account of his past political activities. Quite frankly, the Court is of the opinion that no one knows of the respondent's existence nor will they care about his past political activities once he is returned to Haiti. Consequently, the Court will deny the respondent's application for withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act.

Further considered is a tandem application of the respondent's claim under Article III of the *Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, which became effectively binding on the United States on November 20th of 1994 after the Senate adopted its advice and consent to ratification four years earlier. In February 1999, the Attorney General of the United States implemented interim regulations on the Torture Convention, published in the Federal Register at 8 C.F.R. Part III. These regulations establish the procedures for raising a claim for protection under Article III of the Convention Against Torture, which prohibits the return of an alien to a country where there are substantial grounds for believing he would be in danger of being subjected to torture. The Court has further considered the Board's recent decision in *Matter of S-V-*, Int. Dec. 3430 (BIA 2000), in this regard, which examined various of the regulations implementing the torture convention, setting forth therein the burden of proof the respondent must meet in order to be granted this relief. See also 8 C.F.R. Section 208.16(c)(2). The Court notes that the definition of "torture" is set forth at 8 C.F.R. Section 208.18(a)(1) and thereunder, which the Court will not repeat here.

It is essentially the respondent's contention in this later regard, or at least what the Court will discern respondent is stating, that as a returning deportee to Haiti, he will be subjected to torture as defined under Article I of the Act, as

reflected in Article III and as set forth in implementing Federal Regulations. To the extent that the respondent fears being detained, it does appear that that will almost certainly be the case. The Court is aware of the Amnesty International Report that the respondent referred to, although it is not of this record today. The Court has also attached what has been marked as Court Exhibit 6 in this regard, essentially confirming that criminal deportees to Haiti are automatically detained upon their arrival. The questions of how long they are detained and what will happen to them while they are detained are not reflected in this document.

Although also not reflected in this document, the Court is aware in this regard that the official at the Department of State responsible for Haiti, in other words the officer at the "Haitian desk", has informed the Court outside this record and not pertaining to this particular case, that he confirmed with the Haitian Consul General to the United States, that it is a policy of the Haitian government to, in fact, detain all criminal deportees and that it is the opinion of this State Department official that that is done because due to a great fear on the part of the Haitian government that criminals being deported from the United States, particularly those with no family ties and no job prospects, which covers virtually all of them, will just contribute to or increase the level of criminal activity in Haiti and so they are kept in a detained status.

As noted however, we have no information in this particular record of the treatment of criminal deportees to Haiti. That being the case, the Court must presume that they are treated in like fashion as any other Haitian citizen of being suspected of a crime and held in a detained or imprisoned status. To this extent, the Court will take cognizance of the Department of State's *Country Reports* appended to the record at group Exhibit 5-D and also to a lesser extent, the *Country Profiles*, which is now about three years old, and given Haiti, is almost ancient history. In any

event, the knowledge that the Court has that the respondent would be, in fact, detained, in conjunction with the evidence or the information set forth by the Department of State in this *Country Report*, leaves the Court no alternative but to find that there is the likelihood that he would be subjected to physical mistreatment, including torture, upon his return. Again, the Court has to consider the evidence or the information in the Department of State *Report* in a general fashion and then try to make every attempt in good faith to place it in the context of the respondent's situation. Again, being deported as a criminal to Haiti, he is certainly not going to be welcomed with open arms by the Haitian government. The *Country Reports* do entail the physical abuse of detainees, as well as those in prison, as set forth clearly in the *Country Reports*, including choking, damage to the ear drums, electric shocks, beatings with fists, sticks and belts, etc.

The respondent does not have the burden of proof to show that he will absolutely be subjected to torture upon his return. He need only show that there is a clear likelihood of being subjected to such conditions that constitute torture, upon his return. The Court Exhibit 6, as well as group Exhibit 5-D in this case, leads the Court to conclude that the respondent has met his burden of proof in this case in this matter [sic].

The respondent was questioned concerning his criminal conviction. He pleaded not guilty to the offense of possession with intent to distribute marijuana. He was found guilty by a jury trial and sentenced to 11 1/2 to 23 months, I believe it was, for that offense. The Court is unaware of exactly how much time he did serve for that. The Court cannot consider the fact that the respondent has denied any criminal culpability. The Court must presume that he, at least, is legally guilty because that is in the evidence of record, if not, in fact, factually guilty. It is the respondent's burden to show that this offense was not a particularly serious crime. To this extent, the Court has applied the

standard as set forth by the Board in its decision in the *Matter of L-S-*, Int. Dec. 3386 (BIA 1999). The Court is unaware of exactly what amount of the marijuana involved in this case is, but after taking into consideration the respondent's testimony, absent his professed factual culpability, the Court is going to find that this is not a "particularly serious crime."

This finding is important in relation to the respondent's Convention Against Torture application, in that the Court must decide whether to grant him withholding of removal under Section 241(b)(3) and under the auspices of Article III of the Torture Convention, or deferral of removal as set forth at 8 C.F.R. Section 208.17(a). As the Court has not found the respondent to have been convicted of a particularly serious of [sic] crime, withholding of removal is mandatory in this case, under Article III and the Court will, after considering all of the evidence of this record, grant that relief to him.

Accordingly, based upon the foregoing the following orders are entered.

ORDER

Respondent's application for withholding of removal under Section 241(b)(3) is hereby denied.

ORDER

Respondent is hereby ordered removed from the United States in accordance with his administrative order of removal.

FURTHER ORDER

Respondent's order of removal as to Haiti is hereby withheld under Article III of the Torture Convention.

/s/
WALTER A. DURLING
Immigration Judge

I hereby certify that the attached proceeding before WALTER A. DURLING, in the matter of:

JEAN MARIE LOUIS

A 72 550 854

York, Pennsylvania

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/
(Tracy Robertson, Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

March 11, 2001
(Completion Date)

IMMIGRATION COURT
3434 CONCORD ROAD
YORK, PA 17402

| | |
|---|---|
| In the Matter of: | Case: A72-550-854 |
| LOUIS, JEAN MARIE | |
| Applicant | IN WITHHOLDING-ONLY PROCEEDINGS |
| On behalf of the Applicant | On behalf of the INS |
| Pro se | |

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on February 6, 01 and is issued solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

ORDER: It is hereby ordered that the applicant's request for:

[X] 1. Withholding of Removal under INA 241(b)(3) is:

[ ] Granted

[ ] Withdrawn

[X] Denied

[X] 2. Withholding of Removal under Convention Against Torture is:

[X] Granted

[ ] Withdrawn

[ ] Denied

[ ] 3. Deferral of Removal under the Convention Against Torture is granted.

Date:

/s/
WALTER A. DURLING
Immigration Judge

APPEAL: WAIVED
APPEAL DUE BY: MARCH 8, 01

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CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:

MAIL (M) (PERSONAL SERVICE (P))

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer

[ ] ALIEN'S ATT/REP [ ] INS

DATE: /s/

BY: COURT STAFF _____

Attachments: [ ] EOIR-33 [ ] EOIR-28

[ ] Legal Services List [ ] Other

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

| | | |
|---|---|---|
| **JEAN MARIE LOUIS,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| | ) | |
| **v.** | ) | **No. 03-187[illegible]** |
| | ) | **INS No. A72 550 854** |
| **JOHN ASHCROFT,** | ) | |
| **Attorney General,** | ) | |
| | ) | |
| **Respondent.** | ) | |
| | ) | |

**RESPONDENT'S MOTION TO DISMISS PETITION FOR REVIEW FOR LACK OF JURISDICTION, AND REQUEST TO HOLD BRIEFING IN ABEYANCE**

In response to the Petitioner's June 19, 2003 response to this Court's order to show cause, the Respondent, Attorney General John Ashcroft, submits this motion to dismiss Jean Louis's petition for review because the Court lacks subject matter jurisdiction.

* * *

**ARGUMENT**

**I. BECAUSE LOUIS WAS CONVICTED OF A DRUG TRAFFICKING OFFENSE, AN AGGRAVATED FELONY, COVERED IN SECTION 237(a)(2)(A)(iii) OF THE INA, THE COURT LACKS JURISDICTION AND MUST DISMISS THE PETITION FOR REVIEW.**

Judicial review of final orders of removal is conducted pursuant to section 242 of the INA, 8 U.S.C. § 1252. *See*

INA § 242(a), 8 U.S.C. § 1252(a). Subsection 242(a)(2)(C) provides:

> ORDERS AGAINST CRIMINAL ALIENS. - Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

The Court lacks jurisdiction over Louis's case because Congress explicitly barred judicial review of a removal order based on an aggravated felony, covered in section 237(a)(2)(A)(iii) of the INA, 8 U.S.C. § 1227(a)(2)(A)(iii). This conclusion is supported by the Supreme Court's decision in *Calcano-Martinez v. INS*, 533 U.S. 348, 349 (2001), which held that section 242(a)(2)(C) of the INA, 8 U.S.C. § 1252(a)(2)(C), "fairly explicitly strips the courts of appeals of jurisdiction" to consider petitions for direct review of final removal orders filed by aliens convicted aggravated [sic] felony offenses, which includes the drug trafficking offense committed by Louis. *Id.* Consistent with *Calcano-Martinez*, this Court held in *Patel v. Ashcroft*, 294 F.3d 465 (3d Cir. 2002), that section 242(a)(2)(C) of the INA, 8 U.S.C. § 1252(A)(2)(c), divests circuit courts of jurisdiction to review petitions filed by aliens convicted of enumerated offenses. Louis does not dispute that he is an alien convicted of an aggravated felony. Thus, the jurisdictional bar applies.

Moreover, Louis cannot overcome this jurisdictional bar. First, while the government agrees that this Court should revisit its holding in *Liang v. INS*, 206 F.3d 308 (3d Cir.

2000), that the courts of appeals do not retain jurisdiction to review substantial constitutional claims raised in a petition for review by an alien convicted of an aggravated felony, Louis has raised no such claim here.

* * *

## CONCLUSION

For the foregoing reasons, the Court must dismiss the petition for review for lack of jurisdiction. The Attorney General requests that the Court hold briefing on the merits in abeyance pending disposition of this motion.

Respectfully submitted,
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ATTORNEYS FOR RESPONDENT

Dated:
June 25, 2003